86-103

No. ____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1986

Arlington Hotel Company, Inc., ... *Petitioner*

v.

National Labor Relations Board ..... *Respondent*

and

Southern Missouri-Arkansas District Council, International Ladies' Garment Workers' Union, AFL-CIO ..... *Intervenor*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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July 23, 1986

QUESTION PRESENTED

1. Under the National Labor Relations Act it has been well established that permanently replaced economic strikers have the right of recall to their former or substantially equivalent jobs when vacancies occur. The issue raised herein is whether an employer has the additional legal obligation to recall permanently replaced economic strikers to any job for which they may be qualified to perform, pending further recall to their former or substantially equivalent positions?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Arlington Hotel Company, Inc., represented by Russell Gunter, Kathryn D. Holt, J. Bruce Cross, Lester C. Nail and the Respondent, National Labor Relations Board, represented by Elliott Moore, Victoria Higman, Linda Dreeben, Gerard Fleischut, Coleman Garrett, John F. Harrington and Intervener Southern Missouri-Arkansas District Council, International Ladies' Garment Workers' Union, ALF-CIO, represented by Jay Thomas Youngdahl.

RULE 28.1 LIST

The Arlington Hotel Company, Inc. does not have a parent company. The affiliates and subsidiaries, (other than wholly owned subsidiaries) of the Arlington Hotel Company, Inc., are Southwest Hotels, Inc., Hot Springs Golf and Country Club Association and the Majestic Hotel Company, Inc.

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International Ladies' Garment Workers' Union,
AFL-CIO ..... *Intervenor*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner Arlington Hotel Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on March 4, 1986 and denied rehearing on April 24, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 785 F.2d 249 (8th Cir. 1986), and is reprinted in the appendix hereto; p. A-37 *infra*.

The Memorandum decision of the National Labor Relations Board is reported at 273 NLRB No. 35 118 LRRM 1506 (1984) and is reprinted in the appendix hereto; p. A-1 *infra.*

The Memorandum decision of the Administrtive Law Judge is not reported, *Arlington Hotel Company, Inc.* and *International Ladies' Garment Workers' Union, AFL-CIO,* Nos. 26-CA-8974 andd 26-CA-9024 (August 9, 1982) and is reprinted in the appendix hereto; p. A-6 *infra.*

JURISDICTION

The Respondent brought this action based upon amended charges filed by the International Ladies' Garment Workers; Union, AFL-CIO (Union) on March 23 and April 22, 1981 and a Complaint issued by the Regional Director of the 26th Region of the National Labor Relations Board (NLRB) on May 29, 1981. The Complaint alleged that the Arlington Hotel Company, Inc., (Hotel) violated Sections 8 (a) (1) and (3) of the National Labor Relations Act as amended 29 U.S.C. §151 *et seq* (Act), by refusing to reinstate economic strikers to their former positions or substantially equivalent positions after the strikers made unconditional offers to return.

The decision and order of the Administrtive Law Judge (ALJ), finding the Hotel guilty of violating Sections 8 (a) (1) and (3) of the Act was entered August 9, 1982. The decision and Order of the NLRB affirming the findings of the ALJ was entered December 12, 1984. The Decision and Order of the United States Court of Appeals for the Eighth Circuit was entered March 4, 1986. The Petition for Rehearing *en banc* was denied April 24, 1986. The jurisdiction of this court is invoked under 28. U.S.C. §1254 (1).

STATEMENT OF THE CASE

The Petitioner is resort hotel in Hot Springs, Arkansas. On March 12, 1981, approximately 66 employees seeking union representation went out on an economic strike during the Hotel's busiest season. The Hotel immediately began hiring permanent replacements in order to carry on its business. At the conclusion of the economic strike the Hotel immediately stopped hiring replacements. Strikers presented the Hotel with the following demand:

> "I hereby apply unconditionally for my old job back or, if my old job is not available, my maximum employment rights under the law."

In order to establish a non-discriminatory recall system, the Hotel's general manager met with labor counsel and all hotel department heads. Relying totally on established case law from the National Labor Relations Board (NLRB) the following recall procedure was established.

1. The jobs at the Hotel were grouped into categories which were "substantially equivalent", in accord with NLRB decisions.

2. A list of all strikers, by seniority, within the groupings of substantially equivalent jobs, was prepared by the hotel. The most senior strikers within each job grouping were immediately recalled to fill any vacancies in their former jobs existing in those job groupings at the conclusion of the strike. Strikers not recalled after all the vacancies were filled were considered to be permanently replaced strikers.

3. Permanently replaced strikers were recalled by seniority within the groupings of substantially equivalent jobs whenever *any* vacancy arose in those groupings, regardless of the reason for the vacancy.

4. Permanently replaced strikers were not recalled to jobs which were not their former or substantially equivalent jobs.

The majority of the strikers were recalled immediately to their former jobs. However, permanently replaced strikers were not immediately recalled because their old jobs or substantially equivalent jobs were not available.

The recall procedure was based on the applicable law governing the recall of permanently replaced strikers and taking into full account the maximum legal right of permanently replaced strikers and the maximum legal rights of the employer.

The Hotel readily concedes and has never refuted the fact that there were jobs for which the strikers may have been "qualified" to perform. Strikers were not recalled to these jobs because NLRB case law defining the legal rights of economic strikers vis-a-vis the legal rights of employers did not require such a recall.

On March 23, 1981 the union filed an unfair labor practice charge alleging that the hotel had violated §§8 (a) (1), (3) and (5) of the National Labor Relations Act (Act). These charges were later amended to allege violations of §§8 (a) (1) and (3) of the Act. An Administrative Hearing was held upon these issues and on August 9, 1982 the Administrative Law Judge (ALJ) found that the Arlington Hotel had violated §§8 (a) (1) and (3) of the Act by failing to recall strikers to available jobs for which they may have been qualified. The Arlington Hotel excepted to these findings, but the NLRB affirmed and adopted the findings of the Administrative Law Judge. The Arlington Hotel then timely filed a Petition for Review of the NLRB's decision in the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the decision of the NLRB.

REASON FOR GRANTING THE WRIT

I. THE DECISION BELOW REQUIRING THE PETITIONER TO RECALL PERMANENTLY REPLACED ECONOMIC STRIKERS TO ANY JOB PENDING RECALL TO THEIR FORMER JOB OR SUBSTANTIALLY EQUIVALENT POSITION RAISES IMPORTANT AND UNRESOLVED PROBLEMS AND CONFLICTS WITH OTHER DECISIONS OF THE NLRB.

The issue of this case is whether an employer's failure to recall a permanently replaced striker to a job for which he is qualified, but which is not his former job or a substantially equivalent job, is illegal discrimination under the National Labor Relations Act. This issue can only be resolved by the Supreme Court's articulation of the scope of the employer's legal obligations towards permanently replaced strikers.

SCOPE OF EMPLOYER'S OBLIATION TO RECALL PERMANENTLY REPLACED STRIKERS

In addressing the issue of the scope of an employer's obligation to recall permanently replaced strikers, it is important to remember that this obligation is *not remedial* in nature. Employees have a legal right to engage in an economic strike. Employers have a legal right to hire permanent replacements for economic strikers. When both employees and employers exercise their legal rights, the question arises as to how to accommodate the results of the exercise of these conflicting legal rights without unduly harming the rights of either employees or employers. The balancing of these rights is the focus of this case: "What is the obligation of an employer to a permanently replaced striker?"

Through a long series of cases outlined below, the Supreme Court and the NLRB have fashioned the following obligation: employers must recall permanently replaced

employees to their former or substantially equivalent jobs as vacancies arise in those jobs.

This rather simple principle, which equitably balances the legal rights of both parties, has been subverted by a long line of NLRB decisions which define "substantially equivalent" so narrowly as to preclude recall to anything but the permanently replaced striker's former job. In balancing the equities between employee and employer rights, the NLRB has erroneously equated the law-abiding employer's *equitable obligation* to recall permanently replaced strikers with a law-breaking employer's *remedial obligation* to reinstate a discriminatorily discharged employee.

Under the NLRB's decisions, in order to be held to be substantially equivalent to a striker's former job, an offer of reinstatement must come very, very close to being virtually identical to the striker's former job. The Board has interpreted "former or substantially equivalent job" as follows:

(a) Jobs which require different duties and have different benefits are not substantially equivalent. *Stewart Oil Co.*, 100 NLRB No. 4, *enfd.*, 207 F.2d 8 (5th Cir. 1953).

(b) Jobs which require different skills and having differing work schedules are not substantially equivalent. *Wayne Graphics, Inc.*, 207 NLRB 658, 84 LRRM 1644 (1973).

(c) If the offered job pays more money but has less responsibility than the former job, the jobs are not substantially equivalent. *J.B. Industries*, 245 NLRB 538, 102 LRRM 1500 (1979).

(d) If the offered job pays more money and has more responsibility than the former job, the jobs are not

substantially equivalent. *Wonder Markets, Inc.*, 249 NLRB 294, 104 LRRM 1105 (1980).

(e) If the offered job pays more money but is in a different location than the former job, the jobs are not substantially equivalent. *McCarthy Motor Sales Co.*, 147 NLRB 605 (1964).

(f) If the offered job is identical to the former job, except for the different work days and hours, the jobs are not substantially equivalent. *Providence Medical Center*, 243 NLRB 714, 102 LRRM 1099 (1979).

(g) If the offered job is identical to the former job except that the offered job is on a full-time as opposed to a casual basis, the jobs are not substantially equivalent. *Superior Sanitation*, 234 NLRB 454, 98 LRRM 1342 (1978).

(h) If the offered job is identical to the former job except the offered job is on a different shift than the former job, the jobs are not substantially equivalent. *Harvey Engineering & Manufacturing Corp.*, 116 LRRM 1368 (1984); *Seaport Manor, Inc.*, 248 NLRB 886, 104 LRRM 1124 (1980); *H.F. Binch Co.*, 188 NLRB 720, 76 LRRM 1735 (1971); *modified*, 456 F.2d 357 (2d Cir. 1972); and *Lykes Brothers, Inc.*, 128 NLRB 606, 46 LRRM 1347 (1960).

The Board cases interpreting "former or substantially equivalent jobs" hold that there can be very little difference between the former job and the offered job if the employer is to fulfill its obligation to recall strikers to their "former or substantially equivalent jobs."

The issue in this case is not whether the NLRB's narrow definition of substantially equivalent is correct. The

NLRB has decided the issue and the Arlington Hotel's recall procedure conformed to that narrow definition. It is the result of following the NLRB's narrow definition that has given rise to the issue herein.

The Arlington Hotel readily acknowledged its obligation to recall permanently replaced strikers to their former or substantially equivalent jobs. The Arlington Hotel immediately set up a recall system to comply with that obligation. However, by following the NLRB's narrow definition of substantially equivalent, the recall system resulted in some perceived inequities. For example, waitresses who worked on one shift in the Venetian Dining Room were not recalled to work a different shift in the Venetian Dining Room, in conformity with NLRB decisions which held that identical jobs on different shifts were not substantially equivalent. Similarly, other permanently replaced strikers were not called back to jobs for which they were qualified to perform, because those jobs were not their former or substantially equivalent under the NLRB narrow definition. This seeming inequity is at the core of this case.

It is (or should be) axiomatic that an employer cannot be found guilty of an unfair labor practice for not doing what it has no obligation to do. However, that is exactly what has happened in this case. The Arlington Hotel had no legal obligation to recall strikers to jobs for which they are qualified unless the jobs are their former or substantially equivalent. However, the Hotel's failure to do so has resulted in a finding of an unfair labor practice against the Hotel.

The unfair labor practice was premised on two theories by the Administrative Law Judge. First, the Judge held that an employer has an obligation to recall permanently replaced strikers to *any* position for which they are qualified, pending a further recall to their former or substantially equivalent positions. Second the Judge held

there was overt discrimination in the recall system because the Hotel favored cross-training and because waitresses (for example) were not recalled to waitress jobs in other restaurants in the Hotel, nor to other shifts. The NLRB affirmed the ALJ's decision on the second premise without addressing the first. The Eighth Circuit followed suit.

The Judge's second premise is nothing more than a "bootstrap" argument that clearly ignores prior NLRB decisions defining substantially equivalent jobs. Under those decisions waitress jobs in other restaurants in the Hotel or on other shifts are clearly not substantially equivalent. Again, the Hotel had no obligation to recall strikers to jobs that were not substantially equivalent, and the failure to do what it is not obligated to do cannot, in and of itself, prove discrimination.

The Judge's reliance (as well as the NLRB's and Eighth Circuit's reliance) on the fact that the Hotel favored cross-training to prove overt discrimination is also an attempt to create proof of discrimination through nonfeasance rather than malfeasance. The *only* evidence in the record on the issue of cross-training concerns the *existence*, not application, of cross-training. Nowhere in the record is there evidence of disparate treatment of strikers with regard to cross-training. Nowhere in the record is there evidence of how the cross-training operated. There is no evidence that strikers had been cross-trained. There is no evidence that any strikers asked to be cross-trained. Again, the only evidence in record is the *existence* of pre-strike cross-training.

The fact that cross-training existed does not prove discrimination. It merely proves that the strikers were, in all likelihood, qualified to perform jobs other than their former or substantially equivalent jobs, a fact which the Hotel stipulates. Yes the Hotel favors cross-training. Yes the Hotel agrees the strikers were qualified or qualifiable to do jobs other than their former or substantially equialent

jobs. The *existence* of cross-training only goes to prove qualifications to do other jobs, not discrimination for failure to recall to those other jobs.

The inequities involved in the Hotel's recall system, using the NLRB's narrow and remedial definition of substantially equivalent, were that permanently replaced strikers were not recalled to similar jobs or to other jobs for which they were qualified. On the basis of these inequities, the Judge, the NLRB and the Eighth Circuit all found the recall system to be overtly discriminatory. However, these inequities were created by the NLRB's prior decisions, not by the Arlington Hotel. Nonetheless, the ALJ, the NLRB and the Eighth Circuit all held the Hotel accountable, the grossest inequity of all.

Having disposed of the contention that there was overt discrimination in the recall system, this Court must now focus on what both the NLRB and the Eighth Circuit refused to address: the Judge's holding that an employer has an obligation to recall a permanently replaced striker to any job for which he is qualified pending further recall to his former or substantially equivalent position.

The NLRB has broken with its own precedent in ordering the Hotel to recall permanently replaced strikers to any job for which they may be qualified, pending further recall to their former or substantilly equivalent job. The National Labor Relations Act, as interpreted by four United States Supreme Court cases, and a host of NLRB and U.S. Court of Appeals decisions, only requires an employer to recall permanently replaced economic strikers to their former or substantially equivalent positions. *NLRB v. Mackey Radio and Television Co.*, 304 U.S. 33 (1938); *NLRB v. Erie Resister Corp.*, 373 U.S. 221 (1963); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); and *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967), *Laidlaw Corp.*, 171 NLRB 1366 (1968) *enfd.*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

The Act imposes no obligation upon employers to recall strikers to any jobs for which they may be qualified, pending further recall to their former or substantially equivalent positions. Nonetheless, the Eighth Circuit's opinion implies that permanently replaced economic strikers have a right to be recalled to any job for which they are qualified. The Eighth Circuit, as did the NLRB, noted the Supreme Court's decision in *NLRB v. Fleetwood Trailer Co. Inc.*, 389 U.S. 375 (1967), quoting certain language to support their findings:

> "If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement."

Fleetwood at 619.

This quote has been taken out of context. The Supreme Court was not addressing the issue for which the quote is used to support. The issue in *Fleetwood* was whether permanently replaced economic strikers are entitled to reinstatement to future vacancies in their former jobs or whether they are entitled only to reinstatement to the vacancies that exist only on the day that the striker makes an unconditional offer to return to work. The Supreme Court held that permanently replaced economic strikers are entitled to future vacancies. The NLRB took the language in *Fleetwood* out of context and proclaimed that the Supreme Court has mandated that economic strikers be recalled to any job for which they are qualified pending reinstatement to their former or substantially equivalent positions. That issue was not before the Supreme Court in *Fleetwood* and it is erroneous to affirm the NLRB's reliance on language taken out of context.

Indeed, employers could take this very same language from *Fleetwood* out of context and argue that the Supreme Court has mandated that an economic striker need only be reinstated to a job for which the striker is qualified. An

employer's obligation would then be fully satisfied for example, by recalling a machinist to a janitorial position. This is not what the Supreme Court meant in *Fleetwood.* Rather, it points out the danger of relying on statements to support propositions that the propounders of the original statement were not addressing.

Shortly after the Supreme Court's *Fleetwood* decision, the NLRB, in facts similar to those in *Fleetwood,* decided *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.*, 414 F.2d 99 (7th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970) which was affirmed by the Seventh Circuit. The decision in *Laidlaw* has become the benchmark in all cases involving the recall of economic strikers. *Laidlaw* simply held that an employer was ordered to offer immediate and full reinstatement to the strikers "from the date on which the company should have hired them as *their jobs* became available . . . " 414 F.2d at 103 (emphasis added).

NLRB DECISIONS AFTER LAIDLAW

After *Laidlaw* the NLRB interpreted the Supreme Court cases to hold that:

> "It is well settled that at the conclusion of the strike, upon a union's unconditional offer to return to work, an employer has a duty to offer *reinstatement* to employees with all rights, privileges, and seniority, and working conditions previously enjoyed including their former rates of pay."

Northwest Oyster Farms, Inc., 173 NLRB 872, 69 LRRM 1564 (1968) (emphasis added.) Further in *H.F. Binch Co.*, 188 NLRB 720, 76 LRRM 1735 (1971), *modified*, 456 F.2d 357 (2d Cir. 1972), the NLRB stated that once employees make an unconditional offer to return to work, "under *Laidlaw*, respondent, absent a legitimate justification, would thereafter be required to offer these employees such vacancies as they come available in their old jobs and on

their old shifts, on pain of being legally accountable under §8 (a) (3) and (1)." 188 NLRB at 724. Thus the NLRB has left little doubt but that an employer must reinstate a permanently replaced striker to his or her old job under the same hours and working conditions in order to fulfill its obligations of "full reinstatement", unless the employer can prove some legitimate reason for not doing so.

As to the obligation of recalling a permanently replaced striker to any job he may be qualified to perform, pending further recall to his former or substantially equivalent job, the NLRB decisions addressing the issue hold that an employer has no such obligation. In *New Era Electric Cooperative*, 217 NLRB 477, 74-5 CCH 15656 (1975), the NLRB held that the employer had no obligtion to recall a permanently replaced striker (a first class lineman) to a job of second class lineman, even though the permanently replaced striker was qualified to perform the job.

The NLRB's General Counsel adopted the holding of *New Era Electric* in its Advice Memorandum in *Howard Publications, Inc.*, Case No. 13-CA-15846, 77-8 CCH 20154 (1977), restating that an employer was under no obligation to offer strikers jobs that were not substantially equivalent to the strikers' former jobs. Similarly the NLRB held that an employer had no obligation to recall a physical therapist to a nurse's aide position despite being qualified to perform the job. *Lincoln Hills Nursing Home*, 257 NLRB 1145 (1981). This decision in *Lincoln Hills* is particularly significant because the recall system used in *Lincoln Hills* and approved by the NLRB is *exactly* the same as the recall system used by the Arlington Hotel.

PRACTICAL RESULT OF THIS DECISION

In direct conflict with other decisions, the NLRB has now held that an employer has an interim obligation to offer

a striker any job for which he is qualified, pending recall to his former or substantially equivalent job. The result of this decision is that employers, unions and employees are now left in total confusion as to the legal obligations of an employer's duty to recall economic strikers. The NLRB has spent years establishing the law governing recall of economic strikers. This decision creates chaos in what was a relatively settled area of law.

The NLRB's holding that employers have a duty to recall employees to any jobs for which they are qualified, pending reinstatement to their former or substantially equivalent jobs, not only has no support in law, but also cannot be supported by any practical considerations. The NLRB's decision begs hundreds of unanswerable questions and places an impossible administrative burden on employers. For example, does an economic striker have recall rights to *all* vacancies for which he is qualified to perform, no matter how many times he has refused such recall while awaiting reinstatement to his former or substantially equivalent job? If an economic striker accepts a lesser job pending reinstatement, is he entitled to other vacancies in "better" jobs that are still not substantially equivalent? Is a machinist with more plant seniority than a janitor entitled to janitor openings before the janitor? These are not hypothetical questions, they are practical day-to-day considerations which are the result of this decision. Employers will be forced to spend weeks filling any vacancies, thus harming employees, employers, unions and the economy.

The practical result of this decision is mind-boggling. It flies in the face of the entire development of the law surrounding recall of permanently replaced strikers. The NLRB's decision is neither good sense nor good policy. It does not balance the equities between employee and employer rights. In fact, the major problem with the decision is that it creates a new policy through the back door. This is an abuse of the NLRB's policy making. By

enforcing a policy which creates a new obligation on all employers without establishing guidelines for employers to tailor their recall systems, the NLRB is neglecting its duty to establish good labor policy. This Court and every Court of Appeals recognizes and refers to the NLRB's "expertise" in labor matters. However, the NLRB has misapplied Supreme Court law not only to create an unworkable and unrealistic duty which severely prejudices the rights of employers, but has done it in such a manner that leaves employers, unions and employees totally in the dark as to their rights, duties and obligations under the National Labor Relations Act.

Under these circumstances it is imperative that this Court reverse this decision.

CONCLUSION

For the reasons set forth above, Petitioner prays that this Court grant the petition and review the judgment and opinion below.

Respectfully submitted,

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July 23, 1986

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARLINGTON HOTEL COMPANY, INC.

and

Cases 26-CA-8974 and
26-CA-9024

INTERNTIONAL LADIES' GARMENT WORKERS' UNION, AFL–CIO

DECISION AND ORDER

On 9 August 1982 Administrative Law Judge Robert A. Gritta issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs, and the Charging Party filed a brief in opposition to the Respondent's exceptions. [1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, [2] and conclusions as modified and to adopt the recommended Order as modified. [3]

1
Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

2
In the absence of specific exceptions thereto, we adopt pro forma the judge's finding that the Respondent violated Sec. 8(a)(1) and (3) of the Act by refusing to reinstate striker Aretha Collins."

3
We have concluded that a broad remedial order is inapposite and we have substituted the narrow injunctive language. See *Hickmott Foods*, 242 NLRB 1357 (1979).

The judge found that the Respondent violated Section 8(a)(1) and (3) of the Act by implementing a striker recall policy which restricted the recall of strikers to their prestrike positions and resulted in the preferential hiring of new employees in jobs which, the parties stipulated, the unrecalled strikers were qualified to perform. Inasmuch as valid business considerations might well justify such restrictive recall measures, our affirmance of the judge's above findings rests on the evidence of record which belies any possible business justification for the Respondent's recall procedure here.

The judge found there is ample evidence of the Respondent's avowed policy favoring cross training and multiple capabilities for all hotel employees. The record evidence concerning the Respondent's past transfers—of a painter to dishwasher to housemen; houseman to hotel trainee; bar porter to furniture refinisher; bartender to room service manager—serves to establish the disparateness of promulgating those jobs as separate work functions for purposes of recalling economic strikers who have made unconditional applications for reinstatement. A further illustration of the Respondent's inconsistency vis-a-vis employment and recall policy is shown by the separate grouping of *Dining Room PM* and *Dining Room AM* on the recall document despite the lack of evidence that the Respondent ever classified new dining room hires as PM or AM. Accordingly, for the above reasons and the total absence of evidence of any business justification for the recall procedure utilized by the Respondent, we affirm the judge's finding that the Respondent violated Section 8(a)(1) and (3) of the Act. [4]

4

We are unable, due to the absence of striker seniority dates, to pass on the accuracy of the respective strikers' recall dates as found by the judge. We will accordingly refer the matter to the compliance stage of this proceeding.

ORDER

The National Labor Relations Board adopts the Order of the administrative law judge as modified below and orders that the Respondent, Arlington Hotel Company, Inc., Hot Springs, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Sustitute the following paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Sustitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. 12 December 1984

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminate against striking employees who have applied for reinstatement at a time when their former positions were occupied by replacement employees by refusing to offer each reemployment to an existing vacancy.

WE WILL NOT give job preference to newly hired employees over our returning striker employees.

WE WILL NOT give preference to striker replacement employees over our returning striker employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer each striker against whom we have found to have been discriminated full and immediate reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position of employment without prejudice to his or her seniority or other rights and privileges previously enjoyed; and WE WILL make each striker whole for any loss of pay suffered as a result of the discrimination against her or him, with interest.

ARLINGTON HOTEL COMPANY,
INCORPORATED

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

ARLINGTON HOTEL COMPANY, INC.

and CASES 26-CA-8974
26-CA-9024

INTERNATIONAL LADIES' GARMENT
WORKERS' UNION, AFL-CIO

Coleman Garrett, Esq., Memphis,
TN, for the General Counsel.
Russell Gunter, Esp., and
Kathryn D. Holt, Esq.,
Little Rock, AR, for the
Respondent.

Jay Thomas Youngdahl, Esq.,
Little Rock, AR, for the
Charging Party.

DECISION

Statement of the Case

ROBERT A. GRITTA, Administrative Law Judge: This case was tried before me on December 9, 10 and 11, 1981 in Hot Springs, Arkansas based upon amended charges filed by the International Ladies' Garment Workers' Union, AFL-CIO (herein the Union) on March 23 and April 22, 1981 and a complaint issued by the Regional Director of the 26th Region of the National Labor Relations Board on May 29, 1981. [1] The complaint alleged that the Arlington Hotel Company, Inc., (herein Respondent) violated Section 8(a)(1) and (3) of the Act by refusing to reinstate economic strikers to their former positions or substantially equivalent positions after the strikers made an unconditional offer to return. Respondent's timely answer denied the commission of any unfair labor practices.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were submitted by General Counsel, Respondent and the Union. All briefs were duly considered.

Upon the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following: [2]

1
All dates herein are in 1981 unless otherwise indicated.

2
Joint exhibits #1 & #2 are hereby received into the record.

Findings of Fact

I. Jurisdiction and Status of Labor Organizations — Preliminary Conclusions of Law

The complaint alleges, Respondent admits, and I find that Arlington Hotel Company, Inc., is an Arkansas corporation engaged in the operation of a non-residential hotel in Hot Springs, Arkansas. Jurisdiction is not in issue. Arlington Hotel Company, Inc., annually in the course and conduct of its business operations derives gross revenues in excess of $500,000 and purchases and receives at its Hot Springs, Arkansas facility, goods and materials, valued in excess of $50,000 directly from points located outside the State of Arkansas. I conclude and find that Arlington Hotel Company, Inc., is an employer engaged in commerce and in operations affecting commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Overview [3]

Respondent operates a resort hotel in Hot Springs, Arkansas throughout the year. Besides the horse race season, there is tourism and visitations to the natural spring baths. General Manager Horst Fischer came to the hotel during the winter of 1979. It was his function as general manager to revitalize an ailing facility. He proceeded to upgrade the services of the facility to a first class establishment for guest. Included in Fischer's renovations were a new chef, reorganization of the various

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3 The facts necessary to resolve the issues in this case are largely undisputed. Several fact issues involving conduct of individual employees will be determined as they arise.

functions such as food, beverage and specialty preparations and the service facilities to dispense the products. As a result of the changes, a gourmet dining room was added to the hotel. By the fall of 1980 the changes were well in place and the hotel was functioning as a first class resort under the guidance of Fischer. The horse race season runs from February 5 to April 11 annually and the 1981 season brought over 1,000 guests to the hotel and Fischer's expectations were to maintain 99 percent occupancy. The race season is one of the busiest times for the hotel and the 81 season was interrupted by a strike called by the Union. Fischer was notified of the impending strike on March 12 by an official of the Union. The following morning approximately 66 employees did not report for work. Respondent began hiring replacement employees to carry on its business. After the strike Respondent began recalling the striking employees it considered eligible for reinstatement.

III. The Alleged Unfair Labor Practices

A. Strikes' end; offer to return; recall procedure;

The uncontroverted and/or corroborated evidence in the record discloses the following:

The strike which began on the morning of March 13 ended at 5 p.m. on March 16 when the Union sent Respondent a telegram. The telegram reads:

> On behalf of all striking employees we hereby apply unconditionally for reinstatement to their old positions and/or their maximum employment rights under the law.
>
> On March 17 the striking employees returned individually and presented Respondent's management with a form letter which read:
>
> I hereby apply unconditionally for my old job back, or if my old job is not available, my maximum employment

rights under the law. Please consider this a continuing application for employment.

Respondent ceased hiring replacements on March 16 and devised a recall system to implement the placement of returning strikers. Fischer had prepared a list from information supplied by department heads detailing all employees who had not reported for work during the strike to enable Respondent to determine who had to be replaced during the strike. This list plus a list of employees hired as replacements formed the basis for the recall system on March 16. All jobs in the hotel which included striking employees were grouped into categories and structured as the striking employees former position and substantially equivalent positions. All striking employees were listed by seniority within each category and any vacancies existing in any category were filled by the most senior striker who held that vacant position before the strike. On this basis, 31 strikers were reinstated to their former positions. All remaining strikers were considered by Respondent to be permanently replaced. Any vacancy arising in any category of the recall list was filled by the most senior replaced striker who had occupied the position before the strike. All other vacancies occurring in the hotel were filled by new hired employees without any consideration being given to striking employees awaiting return to work. Fischer stated that it was indicated to him very plainly that the strikers wanted their jobs back and there was just no other way to call them back, except to their old job. For whatever reason, Fischer established the policy that striking employees would only be recalled to their specific pre-strike job. Fischer also stated that he did not consider any striking employees work history in the hotel or any past experience in classification of work other than the employees pre strike classification when recalling replaced strikers.

As a result of Respondent's devised recall system and its policy to only recall strikers for vacancies in their specific pre strike position, 25 striking employees were not

recalled to work. The 25 were composed of five maids, one floor supervisor in Housekeeping, one evening waitress in the Venetian dining room, four morning waitresses in the Venetian dining room, one garde manager, one room service waiter, four cashiers, two bellmen, three banquet employees, one maintenance man, one furniture refinisher and one carpenter. The five maids were grouped for recall as Housekeeping-Maids-Permanent. [4] Ann Pascoe, the floor supervisor, was grouped separately under Housekeeping. The Dining room bus help grouping was divided between busman, p.m. waitresses and a.m. waitresses with only the Venetian dining room represented. [5] The kitchen group was divided into cooks, pantry, pantry temporary, stewards and garde manager, naming Frank Avant as the incumbent. Room service was a separate grouping showing Richard Alexander as the only striker. Cashiers were grouped as permanent and temporary with Bertha Welhelmi and Linda Portwood as permanent and Freida Wallace and Gloria Morse as temporary. Frank Jones and Nathan Dendy were grouped as Bell stand. Three employees, Barbara Dooley, Rita Taylor and Lillie Boone were grouped under the heading, banquet. The engine room was represented by separate groupings: Maintenance, naming Monte Coles: Furniture, naming Wade Ashburry; Carpenter, naming Leroy Doll. Other groupings contained striking employees who were among the 31 recalled immediately or the 10 recalled within several weeks. The striking employees who were denied immediate recall were, according to Respondent, either not needed to carry on its business at strikes end or had been replaced permanently by an employee hired during the strike with the following exceptions: Aretha Collins, maid; denied recall due to strike

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Aretha Collins, Betty Omans, Joyce Richardson, Wanda Morgan and Mary Willis.

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Waitresses - p.m., Helen Lloyd; a.m., Violet Doll, Debbie Mauldin, Marie Halpain, Maggie Brundage.

misconduct; Marie Halpain, a.m. waitress, denied recall due to outside employment; Frank Avant, garde manager, denied recall due to abolishment of his position and Freida Wallace, cashier, who could not be located by Respondent for recall. Excluding the two bellmen, Respondent recalled all other strikers eligible for recall before the case came on for trial.

The record evidence shows that housekeeping maids; Omans, Richardson, Morgan and Willis were recalled on May 7. Floor supervisor, Pascoe, was recalled on September 4. Waitress Helen Lloyd was recalled on April 23 and waitresses; Violet Doll, Mauldin and Brundate were recalled August 5. Room service waiter, Alexander was recalled April 29. Cashiers; Welhelmi was recalled July 2, Portwood was recalled September 8 and Morse was recalled October 12. Banquet waitresses Taylor, Dooley and Boone were reinstated to the banquet call list on July 3. Engine room strikers were recalled as follows: Maintenance, Cales on August 20; Furniture, Ashberry on September 8 and Leroy Doll on October 27.

General Counsel's Exhibit 4 is the compilation made by Respondent of striking employees and their respective groupings. Replacement employees hired during the strike are listed within their respective group to the right on the exhibit.

B. Ineligible for Recall

Aretha Collins was denied recall because Fischer identified her as making a threat to a non-striking employee. Fischer testified that he had feedback on March 13 that an employee was somehow threatened. Fischer had the non-striking employee brought to his office. The employee, Angela Brown, was interviewed by Fischer and his attorney. Fischer stated that Brown related an incident in the hotel lobby where four or five maids, as they walked through the lobby, said to Brown, "We're going to beat the fat off you

after work tonight." Brown identified Aretha Collins as the declarant and that the statement was directed to her. Brown also named Lois Richardson and Mary Willis as among the group of maids. Fischer stated that Brown did not disclose any further substance of the conversation. Fischer said that Brown was distressed, crying and upset and afraid to go home at night now. The hotel saw that she had a cab that evening to go home. Fischer and his attorney decided that Collins was to be denied recall as a result of the incident without any further investigation.

Collins testified that she went through the picket line on Friday, March 13, to get her pay check accompanied by four other employees, Johnnie Moore, Joyce and Lois Richardson and Lula Mae Buckley. As they walked through the lobby they saw Angela Brown dusting. Collins said to Brown, "You're down here dusting, and they are down there picketing. You need a whipping girl." Brown smiled back at Collins but didn't respond. Collins has known Brown for three or four years since Brown has worked at the hotel. Brown is the inspectress on the floor that Collins worked on as a maid. Collins returned to work on the 18th but was told by Fischer she had been replaced temporarily and would be recalled in a month or so by seniority. Fischer did not then, nor since, say anything to Collins about misconduct during the strike.

Angela Brown testified that she worked with Collins both as a maid and a supervisor for a couple of years. When the strike started she was working in the lobby. As she was heading for an elevator she heard someone say, "Girl when you get off work we're going to beat the fat off you." Brown turned around and saw Collins and several other maid-housekeepers. Brown reported the incident to her supervisor who in turn informed Fischer. Brown stated that she was not upset nor crying over the incident when it happened or when she reported it to Fischer. Brown also stated that she and the other maids, including Collins, joke with one another while in the hotel.

Marie Halpain was denied recall because she obtained employment elsewhere during the strike. Halpain had worked at the hotel as a waitress in the venetian dining room for five years, 10 months and 12 days. She went on strike from March 13 to March 16. On March 17, she presented a copy of the Union form letter to Fischer. Halpain testified that Fischer said, "As of now you have been replaced, but when your job becomes available, you will be called back." During the strike while the race season was in full swing, Halpain worked two nights at a neighborhood steak house replacing a girl who was off sick on the weekend. On July 22, after her unemployment ceased, Halpain began working casual at the Downtowner in Hot Springs. She had no other employment during the strike or since the strike ended. In October, Halpain contacted Fischer by phone inquiring why she had not been recalled and stating that she wanted to return to work. Fischer responded, "Marie, your name had been erased from the list." Halpain asked, "Why" and Fischer mentioned something about a steak house. Halpain told Fischer she only filled in for another girl and Fischer said, "I'll talk to my attorney, and get back to you." Halpain has not, to date, received any response from Fischer.

Fischer acknowledged that Halpain returned for work at strikes end but was not recalled. Fischer learned from supervisors two to three weeks after the strike that Halpain was working in a steak house as a waitress, a job equal to her former position at the hotel. At this time Fischer in consultation with Counsel eliminated Halpain for recall. Subsequent to the decision not to recall Halpain, Fischer was contacted by Halpain on two occasions. Once in the summer and second in late fall. On the first occasion Fischer confronted Halpain with the steak house employment and she stated to Fischer that it was temporary work during the race season only. Halpain told Fischer that the steak house was closed down and she was not presently working and wanted to return to the hotel. Fischer testified, "she said, 'why did you not call me back,' and I said, 'you have another

job.' " Fischer informed Counsel of Halpain's circumstances but her removal from the recall list remained extant. During the second conversation Halpain told Fischer that she was desperate to go to work but she was not recalled. Other waitresses who participated in the strike were recalled and new employees were hired off the street throughout the summer and fall.

Frank Avant was refused recall because his former position was abolished prior to the end of the strike. The uncontroverted evidence in the record shows that Avant was employed in the mid 1950's. In 1977 he was classified as butcher at $3.40 an hour. In January 1978 he was put on a salary of $500.00 bi-weekly. A year later his salary was increased to $540.00 and he was reclassified to assistant chef. In February 1980 he received a $60.00 salary increase but the hotel records show no classification at that time.

Fischer testified that when he assumed the helm in the fall of 1979 he found kitchen conditions deplorable in that canned and frozen foods were used exclusively and he set out to change that. Fischer immediately hired an executive chef, Paul Healy, demoted the former chef Parker to sous chef, removed Avant from assistant chef to the pantry and hired two new sous chefs. Fischer found that kitchen employees had certain titles but did not necessarily perform the duties of the title. Fischer was particularly concerned about establishing a basic kitchen first and then getting fancy. Fischer's policy is to use everyone in the kitchen to do any job especially during rush times. Fischer, himself worked in the kitchen to get first hand knowledge of how employees functioned. He was not impressed with Avant, particularly in the area of cooperating with other employes. In mid 1980 Fischer hired a food and beverage director, Heinz Graf Polke, to share the responsibilities with chef Healy. By the fall of 80 Fischer directed chef Healy and Polke to lower the cost of the kitchen and to improve the efficiency. Polke and chef Healy discussed the kitchen situation for several months and decided on March 16 to

abolish the position of garde manager. They jointly made the decision and Fischer approved the decision. When Avant offered to return after the strike Fischer told him his pre-strike position of garde manager had been abolished and he would not be recalled.

Chef Paul Healy testified that he was employed by Respondent on November 26, 1979. After the prior chef was demoted and Avant was moved to the pantry, Healy and Fischer decided that Avant's creative abilities would qualify him to be garde manager. A garde manager traditionally is in charge of cold production in the kitchen, including salads, hors d'oeuvres, cold hors d'oeuvres, canapes, some cold meats such as corned beef and turkeys, also decorative pieces for buffets, aspics, ice earnings, cheese mirrors and cheese trays. Chef Healy considered Avant a good cook and qualified to perform as garde manager albeit he had difficulty helping other employees and cooperating with supervision for extra duties, e.g., Avant did not like to do the ice carvings or work extended hours at the hot stove. Nonetheless, Avant performed the tasks of a garde manager without incident until October 1980. At this time Avant was moved to the pantry and assumed additional duties of the ala carte variety. This move eliminated one pantry employee and was designed to make the kitchen preparations more cost effective. Avant functioned in this capacity up to the strike although chef Healy and Polke continued their review of kitchen procedures to further eliminate waste and inefficiency. Immediately after New Years 1981 one of the three sous chefs quit. Thereafter chef Healy discussed with Fischer the need for further reductions of personnel in the kitchen to lower cost. Avant was among the highest paid help in the kitchen and his productivity was weighed against cost to the hotel. Both Healy and Fischer felt a lot of payroll was tied up in a low production position. When Avant chose to join the strike chef Healy parceled his duties among the kitchen employees who were not as busy as they should have been and on March 15 or 16 made a joint decision with

Polke to close the position of garde manager for economic reasons. Chef Healy, however, had no intention of terminating Avant as an employee. With employees out on strike Healy fully realized that the garde manager position was an unnecessary luxury. After the strike was over the four pantry employees that had participated were recalled to their former positions. In addition, after the strike ended chef Healy needed more help in the kitchen and during the months following the strike hired 6 pantry employees, 26 stewards, 9 washers and 6 cooks. Cooks were hired on March 25, April 27, July 2, August 5, September 11, September 28 and October 28 including replacement for an interim cook who quit. By August Polke and Healy were needing an additional sous chef at a salary comparable to Avants' so Polke placed an advertisement in the local paper. The ad was seeking an experienced sous chef with garde manager capabilities. Chef Healy did not consider Avant for any of the positions that were filled following the end of the strike nor did chef Healy consider Avant qualified as a sous chef. Chef Healy testified that Avant was capable of performing the tasks for which he had hired new employees but added, "aren't we reaching the point of asking a brain surgeon to take out a splinter." Healy stated that Avant was over qualified even for the cooks positions.

Analysis and Conclusions

General Counsel's complaint alleges that the striking employees on March 16 made an unconditional offer to return to their former or substantially equivalent positions of employment and that Respondent refused to reinstate or offer to reinstate the named employees to their former or substantially equivalent position of employment because the employees engaged in strike activity. [6]

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The economic nature of the strike is not in dispute.

Respondents answer denied that the employees offered to return to substantially equivalent positions and that the refusal to reinstate or offer to reinstate the employees was due to their strike activity.

The issues drawn at the trial of the case center on Respondents designed recall procedure and the results of said procedure. General Counsel contends that any striker who was denied an opportunity to return to work in a substantially equivalent position prior to recall to a pre-strike position, is a discriminatee. Respondent contends that the strikers sought only their pre-strike positions expressing no interest in any other positions. With three exceptions, the opposing contentions cover all 25 striking employees named in the complaint. The circumstances surrounding the failure to recall Frank Avant, Marie Halpain and Aretha Collins are separate and distinct.

At the outset it seems appropriate to note that this is not a case where the employer's productivity suffered as a result of the strike (not just because the strike was of short duration but additionally Respondent basically operated a service organization) nor was there any increase in business during the strike which necessitated an expansion of services. The Union called the strike at the height of the Respondent's busiest season in an obvious attempt to strengthen its position as representative of the employees. Either through miscalculation or lack of support the strike lasted only two days. Admittedly, the timing of the strike was not lost on Respondent for Fischer opined that the Union attempted to shut him down at the height of his busiest season. Neither was the short duration of the strike any consolation to Respondent for Fischer viewed the non-striking employees as loyal employees who deserved rewarding treatment from Respondent. Fischer took his hat off to the employees who worked during the strike. Respondent had commitment for 99% occupancy during the race season and the record shows there was no decline. It was admittedly the busiest time of the year for the kitchen.

Thus, Respondent's actions during recall of the strikers must be viewed as deliverate and in no way qualified by peaks and valleys of productivity as normally influenced by striker activity. [7] Further support for this view is found in Fischers testimony detailing how the recall list was determined and the founding basis for that determination, i.e., each striker was listed by work function and thus confined to a specific grouping on the recall list. If several work functions were within the same department of the hotel they were nevertheless grouped separately. [8] Respondent further determined, in its own mind, that such grouping was the only proper basis for recall because the pre-strike work function of each striker was equated with the "only" substantially equivalent employment. Moreover, Fischer, admittedly did not consider any strikers past employment experience in the hotel when faced with filling any post-strike vacancies, notwithstanding his avowed policy of cross-training and multiple capabilities for all hotel employees. In effect, Respondent disqualified all strikers for recall except to their specific pre-strike position arguing in brief that an employer has no obligation to recall a permanently replaced striker at strikes end. In my view, Respondent's recall list as designed precludes consideration of an offer to any striker of a position that is substantially equivalent to the pre-strike position.

Respondent cites many cases quoting selective language of the Courts and the Board to support its failure to recall the named strikers. General Counsel, in turn, cites several cases quoting language from the Courts and the

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The record discloses that during the period following the strike new employees were hired due to factors such as; increased business, expand pantry work, heavy banquet, need for extra employees, workload, race traffic and heavy business. Although five replacements for one striker were hired in the garage the lone striker was still recalled immediately.

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The strikers were listed in each group according to hotel wide seniority.

Board which is supportive of his complaint allegations. As is sometimes the case both parties can find solace in the reported cases but such an ambivalence must be resolved. My reading of the cases leads me to conclude that Respondent was victimized by conceptualism and failure to distinguish factual support for the law of the case. Respondent's arguments, as general propositions, may be accurate when viewed in isolation but when viewed in conjunction with each cases' factual circumstances become less efficacious. Respondent's main case support is *Lincoln Hills Nursing Home*, 257 NLRB No. 145 (1981), cited for the proposition that Respondent has no obligation to recall a replaced striker to any other available position for which the striker may be qualified. Respondent further argues that its recall procedure is identical to that approved by the Board in *Lincoln*. Suffice it to say that the evidence in *Lincoln* showed that recalls were made by seniority as vacancies occurred in *any* available position. With regard to Respondent's specific argument that the Respondent in *Lincoln* was not obligated to recall a physical therapist to a nurses aide position, the decision clearly shows that the record did not contain evidence that any pre-strike position was available at strikes end, resulting in a failure of proof on the part of General Counsel not an approval of Respondent's conduct. Likewise, Respondent's reliance on *New Era Electric*, 217 NLRB No. 477, is misplaced. In *New Era* General Counsel argued that Respondent should have recalled a first class lineman to a second class linemans position that was filled by a new hire. The Administrative Law Judge found that the strikers status was in question in addition to finding that General Counsel was in error in his argument that a pre-strike position was available for the alleged discriminatee which General Counsel argued placed an obligation upon Respondent to offer the position to the questionable striker.

In addition to disagreeing with Respondents argued case support I reject the dual premise for structuring the recall list, i.e., - Respondent's only obligation to a returning

striker is reinstatement in their pre-strike position and if the striker's pre-strike position is filled with a permanent replacement hired during the strike, Respondent has no further recall obligations to the striker unless and until the permanent replacement leaves. [9] In my view, Respondent has confsed its *obligations* to reinstate returning strikers with the *rights* of economic strikers who have unconditionally applied for reinstatement. If an economic striker fails to apply unconditionally for reinstatement the employer is free to continue hiring replacement employees, however upon a strikers unconditional application to return the employer has obligations of reinstatement as a matter of law. Such obligations are not qualified by the language of the unconditional offer. Respondent's erroneous view of its reinstatement obligations and the law in this regard is not a defense. Accordingly, I reject Respondents argument that an economic striker is only entitled to full reinstatement to his pre-strike job. Further, I reject Respondent's reliance upon the failure of any striker to express an interest in a job other than their pre-strike job. Respondent has the obligation to offer reinstatement to returning strikers and must do so without discrimination against the returning strikers. A lesser job with less pay and/or reduced benefits may not be as attractive but it is better than no job at all. The cases cited by Respondent make it abundantly clear that often times replaced economic strikers are offered lesser jobs until their pre-strike positions become vacant. No cited case stands for the proposition that an employer can refuse to offer other jobs to the economic strikers because they have been replaced.

The Board in *Zapex Corporation*, 235 NLRB 1237, synthesized rights and duties attendant to reinstatement of strikers as follows:

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Except for specific instances raised in the record or alluded to in this decision it is undisputed that the replacement employees hired during the strike, were permanent.

Certain principles governing the reinstatement rights of economic strikers are by now well settled. In N.L.R.B. v. Fleetwood Trailer Company, Inc., 389 U.S. 375, 378 (1967), the Supreme Court held that if, after conclusion of a strike, the employer "refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by [Sections] 7 and 13 of the Act . . . Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. The burden of proving justification is on the employer." The Court in *Fleetwood* relied on its decision in *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), where it held that "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." In reevaluating the rights of economic strikers in light of *Fleetwood* and *Great Dane*, the Board in *The Laidlaw Corporation*, 171 NLRB 1366, 1369 (1968), stated that:

The underlying principle in both *Fleetwood* and *Great Dane, supra*, is that certain employer conduct, standing alone, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed. [14] Specifically in *Fleetwood*, the Court found that hiring new employees in the face of outstanding applications for reinstatement from striking employees is presumptively a violation of the Act, irrespective of intent unless the employer sustains his burden by showing legitimate and substantial reasons for his failure to hire the strikers.

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See also *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 211 (1963). Even if a finding of antiunion motivation is necessary, the employer's perference for strangers over tested and competent employees is sufficient basis for inferring such motive, and we, in agreement with the Trial Examiner, would do so if we considered motive material.

In addition the Supreme Court in *Fleetwood* stated: If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show "legitimate and substantial business justifications." Obviously, the Court is requiring an employer to be impartial in hiring for any and all vacancies, particularly when there are outstanding applications from replaced economic strikers. In the instant case, with the exception of three employees, the record evidence shows that Respondent made a judgment based upon the strikers written offer to return to work and supported by the meekest of testimony dealing with attitude of employees. There was no legitimate and substantial business justification for preferring new hired employees over the returning strikers to fill necessary vacancies in the hotel. The Respondent had in the past transfered a painter to dishwasher to houseman, a houseman to hotel trainee, a bar porter to furniture finisher, and a bartender to room service manager.

Rather than consider any striking employee for reinstatement to vacancies occurring after a cessation of strike activities the Respondent hired new employees. From March 20 through November 3 (the date Respondent recalled the last striker) Respondent hired as new employees: 14 waitresses, 4 waiters, 44 maids, 2 inspectresses, 16 bar persons, 1 beverage person, 29 Housemen, 2 newsstand employees, 1 garage employee, 5 repairmen, 1 watchman, 1 cashier, 9 restaurant hostesses, 6 pantry employees, 26 stewards, 9 dishwashers and 6 cooks. During this entire employment period the strikers were recalled by seniority only as vacancies occurred in their pre-strike positions.

It is clear that Respondent's expressed policy of recall resulted in the discriminatory conduct as alleged by General Counsel. Moreover, Respondents implementation of the recall policy included delayed discrimination in that Respondent hired new employees rather than consider the outstanding applications of the strikers.

Respondent argues alternatively that General Counsel has not proven a discriminatory motive for the recall policy and the resulting failure to reinstate striking employees. In my view General Counsel has met his burden of discrimination whether he must prove motive or not and Respondent has not proffered legitimate and substantial business justifications for refusing to recall the strikers to various existing positions when the strike ended. Further, the parties stipulated that the named strikers were qualified for the very vacancies that existed at strikes end and those that occurred during the recall period. In addition, Respondent's records reflect the following: In Housekeeping - Maids - Permanent, 3 pre-strike positions, over and above those filled at strikes end, were vacant. [10] Therefore three additional striking maids should have been recalled immediately. Also, on April 23 Catherine Woodall was transferred out of Housekeeping creating a vacancy for a maid which should have been offered to a striker; the dining room positions of waitress had eight strikers. Four replacements were hired before the strikers made application to return. Three strikers were recalled leaving one pre-strike position open at strikes end. The most senior AM waitress should have been recalled to that vacancy. Further, a new hired waitress was employed on March 20 for the tack room but such vacancy should have been offered to the most senior waitress with an outstanding application. Three more new hired employees reported as waitresses in May and these vacancies should have been offered to the remaining strikers who had applied for reinstatement. Respondent's argument that AM waitress positions are not comparable to PM waitresses is rejected in that Respondent does not classify waitresses when hired as AM or PM. In fact the record shows that waitresses transfer from one dining room to another. Four cashiers went on strike and were permanently replaced. As cashier vacancies occurred the strikers were recalled by seniority, however one new hired employee transferred to food and beverage cashier prior to the last strikers' recall and that vacancy should have been filled by

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Catherine Woodall was erroneously listed as a permanent replacement.

the remaining striker; three banquet waitresses whose names were on the call list participated in the strike. Respondent immediately removed their names from the call list ostensibly to replace them permanently. The record shows that one such replacement, Horne, was transferred from part-time to regular part-time banquet waiter from the nonemployee group on the call list. Since Horne was previously on the call list he could not operate as a replacement employee. Sonnier was a hotel employee and not on the nonemployee call list but rather the hotel employee call list as exra help if the nonemployee call list was exhausted, therefore she could not be a replacement employee for the nonemployee call list. Larry Guinn, a new hired employee for the nonemployee call list, was indeed a replacement employee. Thus, at strikes end two pre-strike positions on the nonemployee banquet call list were open and two strikers should have been immediately recalled. The first banquet work after the strike was March 18, 19, 20 and 22 which was worked only by nonemployees on call, Horne, Guinn and Berthia. Berthia was newly hired but did not appear on Respondent's list as a replacement employee, therefore banquet work was available for all three striking employees immediately after the strike and they should have been recalled. Respondent argues that banquet supervisor, Hoffman, did not follow Fischers' instructions to recall the strikers before hiring any outside employees and therefore Hoffman's dereliction of duty cannot be discrimination by Respondent. Such an argument places the onus on the returning striker which I am not inclined to do. Hoffman is Respondent's supervisor and Respondent is responsible for his actions. Moreover, Fischer's instructions to Hoffman do not recognize the accepted practice prior to the strike, i.e., that hotel employees as alternates were only used for banquet after the nonemployee call list was exhausted. Also, the record shows that a striker replacement in the employee cafeteria, Ashley Norling, who was not on the banquet call list, worked banquets before striking employees were recalled. In fact, the three strikers names should not have been removed from the list but should have simply been passed

over for banquet work. I perceive the nonemployee banquet call list as analogous to the hotels payroll from which striking employees are not removed when engaging in a strike; [11] with regard to maintenance man, Monte Cales, he was one of three that engaged in strike activities. Respondent hired two replacement employees but the record is unclear whether one or both of the other striking maintenance men were recalled at strikes end. If they were not recalled a pre-strike position was open and should have been offered to Cales on March 17 predating his actual recall of August 20 by several months. If the other strikers were recalled to maintenance positions then Cates should have been considered for other vacancies which occurred before his recall to his pre-strike position. Based on the above I conclude and find that several striking employees (enumerated above) should have been recalled immediately to their pre-strike positions and that those strikers whose positions were filled by permanent replacements should have been offered the vacancies present in other positions in the hotel which Respondent filled with new hired employees. It is Respondent's obligation, by Law, to treat returning strikers impartially and I specifically find that Respondent's refusal to consider striking employees, who had made application to return, for positions other than their pre-strike positions discriminated against said strikers by such refusal and by showing partiality for newly hired employees. Respondent's obligation is to offer vacancies to returning strikers. The returning striker has the right as an employee to refuse the offer and elect to await a vacancy in his pre-strike position.

Aretha Collins

Respondent contends that Collins engaged in conduct sufficient to deny her reinstatement rights. The alleged

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Had General Counsel alleged that Dooley, Taylor and Boone were discriminatorily removed from the list when they went on strike I would have so found.

conduct did not take place on the picket line nor was there evidence of any picket line misconduct. The alleged conduct of Collin's was the single isolated incident subject to scrutiny. While no misconduct by strikers is to be condoned it is manifest that the alleged conduct be fully considered before imposition of discipline on strikers. To hold individual striking employees subject to discipline including the loss of reinstatement rights the proof must be substantial for the effect is to render the right to strike nugatory.

It is fully recognized that an employer has the burden of proving that strikers engaged in conduct barring their return to employment. An employer's honest belief that strikers engaged in misconduct of a nature serious enough to require discipline therefor is not a defense if it affirmatively appears that such misconduct did not, in fact, occur as alleged or was less serious in nature. The question in the instant case becomes, "was the alleged misconduct of the striker of a nature requiring disqualification for reemployment. I conclude and find that the alleged statement of Collins was not of such a serious nature as to deny her reinstatement rights. My conclusion is based upon the lack of evidence from Respondent. The evidence presented only evinces a terse conversation between a striker and nonstriker which occurred off the picket line on the employers premises. The apparent basis for Respondents decision to deny reinstatement was subjective and not supported by the testimony of its main witness. Thus, Brown's testimony did not disclose fear of reprisal or apprehension to continue working during the strike. Rather, Brown displayed lack of concern for the statement and affirmatively passed the statement off as the usual talk among maids who are and have been co-workers. Further, Respondent did not fully investigate the incident which to me evinces an attempt to seek reasons, however slight, not to reinstate certain strikers to retaliate for striking. I also note that the group Collins was singled out by Respondent on the slimmest of identity facts. Accordingly, I find that

Collins was denied reinstatement as a returning striker unlawfully and shall order her full reinstatement.

Marie Halpain

Respondent removed Halpain's name from its recall list 2 to 3 weeks after the strike ended as a result of information that Halpain was employed at a local steak house. Subsequent to Halpain's removal several waitresses were hired by Respondent in March, May, June and July contrary to Respondent's argument that the first available position for Halpain existed on August 17. [12] Respondent further argued that if Halpain did not loose her employee status in April she did so in July when she secured her second employment as a waitress which eliminated any recall rights prior to the first available vacancy. I reject Respondent's arguments as unsupported by record evidence. Respondent's claims are based upon strikers securing regular and substantially equivalent employment elsewhere which by statute causes the striker to lose employee status and therefore any reinstatement rights they may otherwise be entitled to. Respondent has the burden to establish that the striker has lost employee status and that burden must be met with objective evidence. The employers belief, however honest or reasonable is not sufficient. The Board has stated, "the question of what constitutes 'regular and substantially equivalent employment' cannot be determined by a mechanistic application of the literal language of the statute but must be determined on an *ad hoc* basis by an objective appraisal of a number of factors, both tangible and intangible, and includes the desire and intent of the employee concerned." [13]

12

I previously found that Respondent makes little or no distinction between dining rooms when hiring waitresses making Respondent's argument that no vacancies occurred in the Venetian dining room (Halpain's former work station) unavailing.

13

Little Rock Airmotive, Inc., 182NLRB 666 (1970).

It appears from the testimony of Fischer and Halpain that the compensation and benefits received by Halpain from the subject employment was not equivalent nor was Halpain satisfied with the interim employment. Fischer knew, or should have known, that Halpain's outside employment was temporary while awaiting recall. Halpain testified such was the case and Fischer reluctantly acknowledged he could not recall he entire conversation. Fischer did admit he knew at the time he was considering Halpain's continued status as an employee of Respondent that the steak house was not a full time business and in fact was closing. In addition, Fischer made no conscious effort to determine what employment Halpain had secured on either occasion. He was satisfied that someone saw her working. That is not enough. The statute requires more before a striker will be relieved of employee status and the attendant rights. In my view, Respondent has again seized upon a meager circumstance in an attempt to punish an employee for engaging in a strike. Accordingly, I conclude and find that Respondent has unlawfully withheld recall from Halpain in violation of the Act and shall order her full reinstatement.

Frank Avant

Avant upon applying for reinstatement at strikes end was told by Fischer that his job of garde manager had been abolished therefore he would not be reemployed by the hotel. Respondent specifically contends that there are no substantially equivalent positions for which Avant is qualified. Apparently, Respondent refers to the sous chef position since the testimony of both chef Healy and Avant leads me to conclude that Avant is not a sous chef. The record shows that Avant performed numerous kitchen tasks in his tenure with Respondent but sous chef was not among them. Albeit Avant was performing some tasks of a garde manager before the strike it appears that Fischer's bestowment of the title was benevolent in nature rather than a promotion. The employment records show no

reclassification of Avant to garde manager nor did Avant train or supervise any employees in the garde manager tasks. As I perceive the evidence Fischer was simply trying to add class to the kitchen operation and was recognizing an existing high paid kitchen employee who had recently been demoted. However, whether Avant was in fact garde manager Respondent has the right to reduce kitchen cost and if a strike presents the first opportunity there is no vice in making adjustments at that time. The evidence does show that Avant's salary and performance was discussed prior to the strike and several adjustments had already been made by the time the strike started. There are certain risks attached to employees electing to engage in strike activity and one of those is that the employer may be forced into belt tightening circumstances which subsequently eliminate the need for employees or their functions. That, I feel is the case here. The record is clear that Fischer was in the midst of a renovation of the hotel's services, particularly the kitchen. Such reworks do not happen overnight nor are they accomplished by a single stroke of the brush. Observation and opportunity can be time consuming as it was here. The need for changes in the kitchen are well substantiated in the record however the effect on Avant does not end there. As I view the circumstances and the law Respondent may very well abolish a strikers job or downgrade the functions for legitimate business reasons but that does not mean that the striker must be denied reemployment. Only in the case where no other vacancies exist can the striker be denied his reinstatement rights. That is not the case here. From March 21st through October 28th 47 positions in the kitchen were filled with new hired employees. Of those 47 positions 12 were functions that Avant had specifically performed for Respondent. Whereas Avant's abilities to perform as sous chef can be questioned his capabilities in the pantry or as a cook cannot. Notwithstanding, Avant's qualifications (past work history) Respondent refused to consider Avant for any vacancy. Therein, lies the violation as I see it. Respondent has the obligation to treat returning strikers impartially which

includes preferential treatment for the returning striker in filling vacancies as they occur. Respondent cannot be heard to say that seeking out strikers to fill usual vacancies is burdensome or unduly restrictive. I see no other way that an employers obligations to strikers can be fulfilled if impartial treatment is the rule. In the last analysis, the Respondent only has to offer a lesser position that is open. It is up to the striker whether he is actually reemployed or not. To refuse to give a returning striker the opportunity to resume his employment for less compensation or benefits by preferring newly hired unknown employees is *prima facie* partiality which I conclude and find is violative of the Act. Accordingly, I shall order Respondent to offer reinstatement to Avant to a kitchen position for which he is qualified including discharge of an incumbent if necessary.

With regard to Freida Wallace, cashier, while her testimony is partially corroborated by objective evidence I cannot fully credit her statements. Her recall of events and their chronology was not specific enough to be helpful except for the ultimate fact which I feel was more imaginative than real. Respondent had what appeared to be a current address in its files (which was occasioned by Wallace giving such notice to her employer) and used it to recall Wallace. There was no forwarding by the postal service which indicates a failure by Wallace to be concerned. There is no credible evidence in the record to suggest any wrong doing on Respondent's part toward Wallace. Respondent having discharged its obligation to Wallace, as shown by the objective evidence, I conclude and find that Respondent has not violated the Act in regards to Freida Wallace. Accordingly, I shall dismiss the allegation as it pertains to Wallace.

In summary and pursuant to my findings above the following strikers should have been reinstated to their pre-strike position on the date indicated:

Aretha Collins, Betty Omans, Joyce Richardson - March 17
Wanda Morgan - April 23
Mary Willis - May 7
Helen Lloyd - March 20
Violet Doll - March 17
Debbie Mauldin - May 6
Maggie Brundage - May 15
Marie Halpain - May 20
Rita Taylor - March 18
Barbara Dooley - March 18
Lillie Boone - March 18
Gloria Morse - October 6

The following strikers should have been offered a vacancy for which they qualify pursuant to the stipulation of the parties on the date and position indicated:

Ann Pascoe - May 10 - maid
Richard Alexander - March 19 - houseman
Frank Jones - March 26 - houseman
Nathan Dendy - March 28 - houseman
Monte Cales - April 10 - houseman
Wade Asbury - April 10 - houseman
Leroy Doll - April 14 - houseman
Frank Avant - March 26 - cook

I acknowledge the difficulty attached to determining whether any replaced striker would have accepted the alternative job offer, or not, however this circumstance is caused by Respondent's discriminatory conduct and therefore the returning strikers should not be held to suffer for conduct not their own.

Additional Conclusions of Law

1. The Respondent discriminated against economic strikers who had applied unconditionally to return to work in violation of Sections 8(A) (1) and (3) of the Act by refusing to recall them to their vacant pre-strike position.

2. The Respondent discriminated against replaced economic strikers who had unconditionally applied to return to work in violation of Sections 8(A) (1) and (3) of the Act by hiring new employees to fill vacancies for which the replaced strikers were qualified.

3. The Respondent discriminated against economic strikers, Aretha Collins, Marie Halpain and Frank Avant, each of whom applied for reinstatement, in violation of Sections 8(A) (1) and (3) of the Act by denying them reinstatement rights to employment.

4. The aforesaid unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminated against its striking employees, I find it necessary to order it to offer them full reinstatement to their former position or if that position no longer exist, to a substantially equivalent position, with backpay computed on a quarterly basis and interest therein to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977),[14] from the date that each should have been offered reinstatement to the date that each returning striker was actually reinstated or is actually reinstated.

14
See generally, *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [15]

ORDER

Respondent, Arlington Hotel Company, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discriminating against employees by failing to accord them their reinstatement rights as economic strikers and without regard to whether each individual striker had been permanently replaced or not.

(b) In any other manner interfering with, restraining, coercing, or discriminating against its employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer each striker against whom the employer has been found to have discriminated by refusing reinstatement, full and immediate reinstatement to his or her former job or, if that job no longer exist, to a substantially equivalent position of employment without prejudice to his or her seniority or other rights and privileges or, to a position for which the striker is qualified; make each such striker whole for any loss of pay suffered as

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In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waiver for all purposes.

a result of the discrimination against him or her in the manner set forth hereinabove in the section entitled "Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to a determination of each strikers seniority and the position Respondent is required to offer each striker and the amount of backpay due each discriminatee.

(c) Post at its Hotel in Hot Springs, Arkansas copies of the attached notice marked "Appendix." [16] Copies of the notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondents' authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director, in writing, within 20 days from the date of this order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

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In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated at Washington, DC August 9, 1982.

/s. Robert A. Gritta
Robert A. Gritta
Administrative Law Judge

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a trial, during which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discriminate against striking employees who have applied for reinstatement at a time when there former position was occupied by a replacement employee by refusing to offer each re-employment to an existing vacancy.

WE WILL NOT give job preference to newly hired employees over our returning striker employees.

WE WILL NOT give job preference to striker replacement employees over our returning striker employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce any of you in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act.

Arlington Hotel Company, Inc.
(Employer)

Date _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. Mid-Memphis Tower, 8th Floor, 1407 Union Avenue, Post Office Box 41559, Memphis, Tenessee 39104. Telephone: (901) 521-2687.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1006

Arlington Hotel Company, Inc.,	*	
	*	
Petitioner,	*	
	*	Petition for Review
vs.	*	of Order of the National
	*	Labor Relations Board.
National Labor Relations Board,	*	
	*	
Respondent,	*	
	*	
and	*	
	*	
Southern Missouri-Arkansas District Council, International Ladies' Garment Workers' Union, AFL-CIO, (Charging Parties)	*	
	*	
Intervenor.	*	

Submitted: October 14, 1985

Filed: March 4, 1986

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HEANEY, Circuit Judge.

This case is before the Court on the petition of Arlington Hotel Co., Inc. (the Hotel) for review of an order of the National

Labor Relations Board. The Board found tht the Hotel violated section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) and (1), by implementing a striker recall policy which restricted the recall of strikers to their pre-strike positions and resulted in the preferential hiring of new employees in jobs that the strikers were qualified to perform. For reversal, the hotel argues that its recall system complied with the law inasmuch as returning strikers were offered their old jobs or substantially equivalent jobs, and that it is not obligated to offer returning strikers any available job for which they are qualified. We enforce the Board's order.

BACKGROUND

On March 12, 1981, the Southern Missouri-Arkansas District Council, International Ladies Garment Workers Union, ALF-CIO (the Union) notified Horst Fischer, General Manager of the Hotel, that employees seeking Union representation would strike the next day. The Union's purpose in organizing the strike was to obtain recognition as collective-bargaining representative for a unit of service workers at the Hotel. On March 13, 1981, approximately sixty-six employees—including waitresses, maids, busmen, kitchen help, bellmen, and maintenance workers—did not report to work.

This strike occurred during the busiest time of the year for the Hotel. The Hotel was ninety-nine percent full with over one thousand guests registered. Consequently, Fischer immediately began hiring replacement workers in order to carry on business.

On March 16, 1981, three days after it began, the strike ended. At 5:00 p.m., the Union sent the Hotel the following telegram:

> On behalf of all striking employees we hereby apply unconditionally for reinstatement to their old positions and/or their maximum employments rights under the law.

On March 17, the striking employees began returning to the Hotel, individually, and presented management with a form letter:

> I hereby apply unconditionally for my old job back, or if my old job is not available, my maximum employment rights under the law.

Upon notification of the strike's end, the Hotel ceased hiring replacements. Fischer then devised and administered a system for recalling strikers. Striking workers were categorized by their job titles, and were listed by Hotel-wide seniority within each title. Where no opening existed in the employee's pre-strike position, the employee was required to wait for such an opening, and was not considered for any other job regardless of his qualifications. The Hotel was fully aware that the strikers were qualified to fill many different hotel jobs, because it employed a practice of cross-training employees. Using this system, thirty-one strikers were immediately reinstated. Ten were recalled within several weeks. Twenty-five striking employees were not recalled and were locked into a job—specific chart.

From the end of the strike until December 11, 1981, when the record in this case closed, the Hotel hired over two hundred new employees in positions that the unrecalled strikers were qualified to fill. Also during that period, consistent with its policy of cross-training and developing multiple capabilities for its employees, the Hotel filled numerous vacancies by transferring employees, who had not been strikers, between departments.

On March 23, 1981, the Union filed an unfair labor practice charge alleging that the Hotel had violated section 8(a)(1), and (3), and (5) of the Act. This charge was subsequently amended and consolidated with a second charge. An administrative hearing was held on December 9, 10, and 11, 1981 before Administrative Law Judge Robert

A. Gritta. On August 9, 1982, the ALJ issued his opinion, finding that the Hotel had violated section 8 (a) (1) and (3) of the Act by failing to recall strikers to any position other than to their former jobs or their substantial equivalent, rather than recalling strikers to available positions for which they were qualified. On December 13, 1984, the Board adopted the findings and decision of the ALJ. The Board's order requires the Hotel to offer strikers reinstatement to their former jobs or, if unavailable, to substantially equivalent positions or, if unavailable, to positions for which they are qualified. The Board's order further requires the Hotel to make strikers whole for any loss of earnings suffered because of the discrimination against them. The Hotel filed a petition for review in this Court.

ANALYSIS

The Hotel argues that, with this decision, the Board has departed from its own precedent. In its view, the Act and prior Board decisions require employers to recall strikers only to their former or substantially equivalent positions, imposing no obligation upon employers to recall strikers to other positions for which they are qualified.

In determining that the Hotel was obligated to recall strikers to jobs for which they are qualified, the Board relied on *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375, 19 L.Ed.2d 614, 88 S.Ct. 543. *Fleetwood* addressed the question of whether a striker's right to reinstatement expires if, on the date he first applies for reinstatement, his position is filled by a replacement workers, or whether this right continues until a job becomes available. The Court determined that this right continues: "If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement." *Fleetwood* at 619. We need not definitively rule as to the scope of this statement from *Fleetwood*.

Under the facts of this case, we find that the Board did not err in holding that the Hotel discriminated against the

strikers by not offering them jobs for which they were qualified. The Hotel had a policy of cross-training and developing multiple capabilities for its employees. After the strike, the Hotel filled numerous vacancies by transferring employees, who had not been strikers, between unrelated jobs and departments. The transfers included: painter to dishwasher to houseman; houseman to hotel trainee; bar porter to furniture refinisher; bartender to room service manager; Tack Room waiter to room service waiter; Tack Room waitress to Venetian dining room waitress; maid to bath attendant; houseman to garage attendant; busboy to engine room worker; and busboy to room service waiter.

Although the hotel was hiring new employees and transferring non-strikers, it did not consider a striking housekeeping inspectress for any of twenty-two maid openings. Two bellmen were not considered for twenty-six new housemen openings. Three engine room employees, a maintenance man, a furniture refinisher, and a carpenter, were not considered for jobs as housemen either—despite the fact that the Hotel considered them qualified.

Further, a waitress, who had worked in the Venetian dining room before the strike, was not offered a job in the Tack Room although a non-striking employee was transferred between the two rooms. In addition, the Hotel delayed reinstating at least eleven employees who pre-strike or similar jobs became available.

The discriminatory restrictiveness in the Hotel's recall policy is particularly clear when viewed in light of the Hotel's long-term policy of favoring cross-training and multiple capabilities of all Hotel employees. As General Manager Fischer testified at the hearing: "I believe in cross-training."

The Hotel's recall policy, therefore, clearly discriminated against unreinstated strikers in favor of new job applicants and employees—including permanent striker

replacements—already on the payroll. Thus, the burden was on the Hotel to establish a substantial and legitimate business justification for its discriminatory conduct.

The Hotel has asserted two justifications for its conduct, neither of which involves its ability to operate its business efficiently. Its first justification is that it did not offer the strikers any of the vacancies because it feared liability under the Act if it offered a striker anything but "substantially equivalent employment." Its other justification is that, in its view of the law, the strikers had no entitlement to those vacancies. Neither purported justification excuses its conduct. The decision of the Board is enforced.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1006

Arlington Hotel Company, Inc.,	*	
Petitioner,	*	
vs.	*	Petition for Review of Order of National Labor Relations Board
National Labor Relations Board,	*	
Respondent.	*	

Petitioner's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

April 24, 1986